

# American University Journal of Gender, Social Policy & the Law

---

Volume 28 | Issue 2

Article 4

---

2020

## Closeted or Credible: How Misinterpretation of the Real ID Act Prevents Closeted LGBTQ+ Applicants from Establishing Credible Asylum Claims

Mary Kate O'Connell

*American University Washington College of Law*

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/jgspl>



Part of the [Human Rights Law Commons](#), [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

O'Connell, Mary Kate (2020) "Closeted or Credible: How Misinterpretation of the Real ID Act Prevents Closeted LGBTQ+ Applicants from Establishing Credible Asylum Claims," *American University Journal of Gender, Social Policy & the Law*. Vol. 28 : Iss. 2 , Article 4.

Available at: <https://digitalcommons.wcl.american.edu/jgspl/vol28/iss2/4>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Journal of Gender, Social Policy & the Law by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# CLOSETED OR CREDIBLE: HOW MISINTERPRETATION OF THE REAL ID ACT PREVENTS CLOSETED LGBTQ+ APPLICANTS FROM ESTABLISHING CREDIBLE ASYLUM CLAIMS

MARY KATE O'CONNELL\*

|                                                                                                                                                                                                                                                  |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Introduction .....                                                                                                                                                                                                                               | 224 |
| I. Background .....                                                                                                                                                                                                                              | 226 |
| A. Closeted LGBTQ+ Asylum Claims.....                                                                                                                                                                                                            | 226 |
| B. REAL ID Act Changes the Burden of Proof for Asylum Applicants.....                                                                                                                                                                            | 228 |
| 1. Pre-Real ID Act Evidentiary Standard.....                                                                                                                                                                                                     | 228 |
| 2. Post-REAL ID Act Evidentiary Standard .....                                                                                                                                                                                                   | 229 |
| C. Challenges the REAL ID Act Presents for Closeted LGBTQ+ Asylum Applicants .....                                                                                                                                                               | 230 |
| II. Analysis.....                                                                                                                                                                                                                                | 232 |
| A. IJs Have Misinterpreted the REAL ID Act as Requiring Corroboration and Satisfaction of Subjective Elements of Credibility Despite Binding Case Law Requiring the Totality of the Circumstances Standard and Exceptions to Corroboration. .... | 232 |
| 1. The REAL ID Act's Addition of the "Sustaining the                                                                                                                                                                                             |     |

---

\* Mary Kate O'Connell is a Juris Doctor candidate in the evening program at American University Washington College of Law. She graduated from George Washington University in 2015 and has spent the last five years working in immigration law at Fragomen, Del Rey, Bernsen & Loewy, LLP. Mary Kate would like to thank her family, friends, and boyfriend for their endless support throughout law school, as well as all JGSPL staffers who contributed to this article.

|                                                                                                                                                                                                                                                                          |     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Burden” Section Has Been Misinterpreted as Always<br>Requiring Asylum Applicants to Corroborate Their<br>Claims even Though There Are Exceptions to<br>Corroboration. ....                                                                                               | 232 |
| 2. The REAL ID Act’s Addition of the “Credibility<br>Determination” Section Has Been Misinterpreted as<br>Requiring Asylum Applicants to Satisfy All Subjective<br>Factors of Credibility even Though the Totality of the<br>Circumstances is the Correct Standard. .... | 234 |
| B. Misinterpretation of the REAL ID Act’s Modification to<br>the Burden of Proof Section of Asylum Regulation<br>Resulted in the Denial of Closeted LGBTQ+ Applicants’<br>Asylum Claims .....                                                                            | 237 |
| 1. Misinterpretation Results in the Denial of Closeted<br>LGBTQ+ Asylum Claims Based on Lack of<br>Corroboration. ....                                                                                                                                                   | 238 |
| 2. Misinterpretation Results in the Denial of Closeted<br>LGBTQ+ Asylum Claims Based on Adverse<br>Credibility Determinations.....                                                                                                                                       | 241 |
| III. Policy Recommendation.....                                                                                                                                                                                                                                          | 245 |
| Conclusion.....                                                                                                                                                                                                                                                          | 246 |

## INTRODUCTION

In 2007, an immigration judge (IJ) denied asylum to Dominic Moab, a young, closeted gay man from Liberia.<sup>1</sup> The immigration judge (“IJ”) did not find Mr. Moab credible because he did not immediately disclose his sexuality when Customs and Border Protection apprehended him upon his arrival in the U.S.<sup>2</sup> Mr. Moab had fled Liberia because he was beaten three times and called a “devil” due to his sexual orientation.<sup>3</sup> In 2008, an IJ denied asylum to Prince Henry Eke, a closeted gay man from Nigeria, because he failed to present credible, corroborating evidence that the

---

1. *See* Moab v. Gonzales, 500 F.3d 656, 661 (7th Cir. 2007) (stating that Mr. Moab fled Liberia because he feared facing further persecution from the community if it was discovered that he was gay).

2. *See id.* at 660,662 (remanding the case because the Board of Immigration Appeals (“BIA”) erred in determining that Mr. Moab’s claim was not credible because he failed to mention his homosexuality during his initial interview at O’Hare airport).

3. *See id.* at 657 (describing the persecution Mr. Moab faced in Liberia on account of his sexual orientation as sufficient to establish a well-founded fear of persecution).

persecution he suffered was because he was gay.<sup>4</sup> Mr. Eke hid his sexual orientation from his wife and children to avoid ostracism or death by the people in his village.<sup>5</sup> Similarly, in 2009, an IJ denied asylum to Tarik Razkane, a closeted gay man from Morocco, because his lack of adherence to LGBTQ+ stereotypes, such as the way he dressed, talked, and walked, demonstrated a lack of credibility.<sup>6</sup>

Following the passage of the REAL ID Act in 2005, closeted LGBTQ+ applicants have struggled to overcome the burden of proof for establishing credible asylum claims.<sup>7</sup> This is because IJs have misinterpreted the REAL ID Act as replacing the “totality of the circumstances” standard with a requirement for credible, persuasive, and corroborating evidence.<sup>8</sup> As the above examples illustrate, since 2005, the misinterpretation of the REAL ID Act’s modifications to the credibility section of U.S. asylum law resulted in multiple cases similar to those of Mr. Moab, Mr. Eke, and Mr. Razkane.<sup>9</sup> IJs deem corroborating evidence of one’s sexuality a necessity, yet such evidence is often unavailable for closeted LGBTQ+ applicants—resulting in frequent adverse credibility determinations and denials of closeted LGBTQ+ asylum claims.<sup>10</sup>

This Comment argues that IJs’ misinterpretation of the REAL ID Act’s changes to credibility standards created an unreasonable burden of proof that

---

4. See *Eke v. Mukasey*, 512 F.3d 372, 381 (7th Cir. 2008) (citing 8 U.S.C. § 1252(b)(4)) (finding that under the REAL ID Act, Mr. Eke’s testimony alone was not credible because corroborating evidence of his sexuality should have been available).

5. See *id.* at 376 (describing the great lengths Mr. Eke took to prevent his community from discovering his homosexuality).

6. See *Razkane v. Holder*, 562 F.3d 1283, 1288-89 (10th Cir. 2009) (remanding the case to another IJ who concluded that requiring an individual to provide evidence that shows their choice to identify as LGBTQ+ ‘is unreasonable and invites bias).

7. See *id.* at 1285 (finding that the IJ and BIA did not properly account for the “totality of the circumstances” in Mr. Razkane’s case).

8. See 8 U.S.C. § 1158(b)(1)(B)(ii-iii) (2006) (amending 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii)(2002)) (noting that corroborating evidence can be requested if the applicant’s testimony is not credible and that “credibility” depends on the “totality of the circumstances,” which includes subjective factors like responsiveness, inconsistencies, and demeanor).

9. See generally Melanie A. Conroy, *Real Bias: How REAL ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1-47 (2009) (discussing the REAL ID Act’s adverse effects on queer asylum applicants, including the denial of claims due to adverse credibility determinations).

10. See *id.* at 25 (arguing that queer asylum applicants providing credible testimony is no longer enough for the IJ’s because of a reliance on the REAL ID Act’s corroboration requirement).

requires otherwise credible closeted LGBTQ+ applicants to present corroborating evidence to support their claims of persecution.<sup>11</sup> Part I describes how closeted LGBTQ+ individuals are eligible for asylum and how the REAL ID Act of 2005 altered the burden of proof for these LGBTQ+ asylum applicants.<sup>12</sup> Part I also highlights the challenges the post-REAL ID Act burden of proof presents to closeted LGBTQ+ applicants in establishing the protected ground and nexus requirements for asylum.<sup>13</sup> Part II argues that IJs have misinterpreted the REAL ID Act that creates an unreasonable evidentiary burden for closeted LGBTQ+ asylum applicants—now unable to meet the requirements for asylum eligibility.<sup>14</sup> Part III recommends that closeted LGBTQ+ asylum applicants should not be required to present corroborating evidence if: (1) they are deemed credible and (2) such evidence is unobtainable, as personal testimony is still legally sufficient despite IJs misinterpreting the REAL ID Act.<sup>15</sup> This article concludes that IJs' reading of the REAL ID Act as requiring corroborating evidence from all applicants creates an undue burden for closeted LGBTQ+ asylum applicants.<sup>16</sup>

## I. BACKGROUND

### A. Closeted LGBTQ+ Asylum Claims

Closeted LGBTQ+ individuals qualify for asylum if they are unable to return to their home country due to persecution or a well-founded fear of persecution because of a protected ground.<sup>17</sup> To establish eligibility, the individual must show that the protected ground was a central reason for

---

11. See 8 U.S.C. § 1158(b)(1)(B) (i-iii) (enabling the trier of fact to weigh credible testimony with other evidence and to determine that corroborating evidence is required in the absence of credibility).

12. See *infra* Part I (comparing the burden of proof standards for asylum applicants before and after the passage of the REAL ID Act).

13. See *infra* Part I (discussing how closeted LGBTQ+ asylum applicants struggle to present corroborating evidence of their asylum eligibility).

14. See *infra* Part II (arguing that the REAL ID Act's corroborating evidence requirement has been misinterpreted).

15. See *infra* Part III (emphasizing the importance of the totality of the circumstances evidentiary standard for closeted LGBTQ+ asylum applicants).

16. See *infra* Part IV (concluding that not requiring corroborating evidence from otherwise credible closeted LGBTQ+ asylum applicants is compliant with the REAL ID Act).

17. See 8 U.S.C. § 1101(a)(42)(a) (2019) (enumerating the protected grounds as race, religion, nationality, membership in a particular social group, and political opinion).

persecution.<sup>18</sup> Establishing persecution due to the protected ground entitles an applicant to a rebuttable presumption of a well-founded fear of future persecution.<sup>19</sup> Alternatively, an applicant can establish a well-founded fear of future persecution by showing that they have a subjectively genuine and objectively reasonable fear of future persecution.<sup>20</sup>

Closeted LGBTQ+ applicants have established asylum eligibility by showing that they suffered persecution or have a well-founded fear of persecution on account of membership in a particular social group.<sup>21</sup> The relevant particular social group for such cases is often the LGBTQ+ community of the applicant's country of origin.<sup>22</sup> To show membership in the LGBTQ+ community, closeted asylum applicants must establish their inclusion in the community despite withholding their sexual orientation and that their perceived or imputed membership in the community was one central reason for their persecution.<sup>23</sup> Depending on the applicant's country of origin, establishing perceived membership in the LGBTQ+ community has presented some challenges for closeted asylum seekers.<sup>24</sup> For closeted LGBTQ+ applicants coming from countries with an established pattern and practice of persecution against queer people, evidence of perceived or actual membership in the LGBTQ+ community is often sparse because of the

---

18. See 8 U.S.C. § 1158(b)(1)(A) (2019) (establishing that the grounds under which the Secretary of Homeland Security or Attorney General may grant asylum include "well-founded fear" of persecution that results from one of the enumerated protected grounds).

19. See 8 C.F.R. § 1208.13(b)(1) (2019) (stating that establishing past persecution creates a rebuttable presumption of well-founded fear of future persecution).

20. See *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (outlining how asylum eligibility post REAL ID Act is more dependent on credibility and corroboration).

21. See *Matter of M-E-V-G*, 26 I&N Dec. 227, 237 (BIA 2014) (holding that particular social groups require a common immutable characteristic, particularity, and social distinction, and defining an immutable characteristic as one that cannot be changed).

22. See *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (reversing the IJ's denial of asylum and holding that a queer man was eligible for asylum due to persecution on account of membership in the particular social group of gay men in Cuba).

23. See *Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3rd Cir. 2003) (holding that an applicant's membership in a particular social group can be established through perceived or imputed membership *if* persecutors viewed the applicant as belonging to the group through shared characteristics, despite no concrete evidence of membership in the group).

24. See *Ali v. Mukasey*, 529 F.3d 478, 491 (2nd Cir. 2008) (remanding the case to the IJ because the IJ had decided a Guyanese applicant had not shown he was "gay enough" to establish membership in a particular social group).

applicants' attempts to avoid related persecution.<sup>25</sup>

*B. REAL ID Act Changes the Burden of Proof for Asylum Applicants*

*1. Pre-Real ID Act Evidentiary Standard*

Prior to 2005, the burden of proof for asylum applicants focused more on presenting credible testimony than providing corroborating evidence.<sup>26</sup> Testimony was credible if it was plausible, detailed, and coherent.<sup>27</sup> It was understood that many asylum applicants are unable to obtain corroborating evidence for their personal testimony, given the lengths taken to arrive in the U.S. and the pressure persecution placed on them to flee their country—often leaving applicants without sufficient time to gather evidence confirming their persecution.<sup>28</sup>

While broad, uncorroborated claims were generally not found to be credible and sufficient to establish asylum eligibility, lack of evidence was not held against applicants.<sup>29</sup> If an applicant's testimony persuasively demonstrated why such evidence was not available or attainable, corroboration was generally not required.<sup>30</sup> When a court required corroboration due to a lack of specificity in an applicant's personal testimony, it accepted background information—such as country conditions reports—as valid corroborating evidence to complete the record.<sup>31</sup> Overall,

---

25. See *Eke v. Mukasey*, 512 F.3d 372, 382 (7th Cir. 2008) (finding that there was a pattern and practice of persecuting queer people in Nigeria, but holding that the applicant did not establish his membership in the LGBTQ+ community because he fathered children and avoided engaging in queer acts while in Nigeria).

26. See *Conroy*, *supra* note 9, at 5 (citing *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (emphasizing a drastic change between pre-REAL ID law which recognized personal testimony as the most critical piece of evidence for an asylum claim to post-REAL ID law which intentionally deemphasizes ones' personal testimony)).

27. See *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (holding that an applicant's own testimony can be enough without corroboration if it is believable, consistent, and sufficiently detailed and provides a plausible and coherent basis for the applicant's well-founded fear).

28. See *id.* (recognizing the challenges asylum seekers face in obtaining documentary evidence and holding that the lack of such evidence is not necessarily fatal to a case).

29. See *In the Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989) (holding that sweeping claims of persecution are generally not enough to establish a valid asylum claim and that any supporting evidence should always be presented if available).

30. See *id.* (affirming that corroboration may not always be possible and allowing for certain personal testimony to be sufficient in the absence of corroboration).

31. See *In re S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997) (holding that general country conditions information can supplement an applicant's personal testimony where it is



the court assessed the content of an applicant's testimony for credibility, given the totality of the circumstances that consisted of: background information on the country of origin and human rights situation, the availability or unavailability of corroborating evidence and its consistency, detail, and specificity among the facts in the testimony.<sup>32</sup> These evidentiary requirements for asylum applicants complied with United Nations guidance on the subject, which advises triers of fact in asylum cases to consider any subjective factor when assessing the credibility of an asylum applicant's claim.<sup>33</sup>

## 2. *Post-REAL ID Act Evidentiary Standard*

The REAL ID Act of 2005 modified the burden of proof section of asylum regulation to include sections on "sustaining the burden" and "credibility determination."<sup>34</sup> The section on "sustaining the burden" requires an asylum applicant to present corroborating evidence to support otherwise credible personal testimony unless such evidence is unavailable and beyond reasonable obtainability.<sup>35</sup> The section on "credibility determination" no longer gives asylum applicants the benefit of the doubt regarding their personal testimony, but triers of fact still must consider the totality of the circumstances when assessing credibility.<sup>36</sup>

The REAL ID Act's modifications to the burden of proof for asylum

---

unreasonable to demand corroborating evidence from the applicant).

32. See *Matter of E-P-*, 21 I&N Dec. 860, 867 (BIA 1997) (holding that fair adjudication of asylum claims requires reasonable consideration of the facts of an applicant's testimony in tandem with available background information on the persecution asserted).

33. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (2019), <https://www.refworld.org/docid/5cb474b27.html> [hereinafter UNHRC Handbook] (highlighting that it is necessary to address an applicant's interpretation of the situation, personal and family background, membership in groups, and personal experiences).

34. See 8 U.S.C. § 1158(b)(1)(B)(i-iii) (2006) (amending 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii)(2002) (adding sections on "sustaining the burden" and "credibility determination," whereby both have heightened the burden of proof for asylum applicants).

35. See 8 U.S.C. § 1158(b)(1)(B)(ii) (noting that credible testimony alone may sometimes be sufficient, but that the trier of fact is permitted to weigh credible testimony along with other evidence such as country condition reports).

36. See 8 U.S.C. § 1158(b)(1)(B)(iii) (defining the totality of the circumstances factors as demeanor, candor, or responsiveness of the applicant, plausibility of account, consistency of statements, circumstances of statements, and any inaccuracies or falsehoods).



applicants gives more discretion to triers of fact when making adverse credibility determinations.<sup>37</sup> This discretion is often fatal to asylum claims where corroborating evidence is not available or reasonably attainable.<sup>38</sup> Although the regulation does not require corroboration if such evidence is unavailable and cannot be reasonably obtained, IJs and the BIA's reading of the REAL ID Act requires corroborating evidence in all circumstances, with few exceptions.<sup>39</sup> Such an interpretation is a departure from the United Nation's guidance to consider an applicant's testimony, circumstances, and inconsistencies as a whole, regardless of whether asylum applicants provide corroborating evidence.<sup>40</sup>

*C. Challenges the REAL ID Act Presents for Closeted LGBTQ+ Asylum Applicants*

Misinterpretation of the REAL ID Act's modification to the burden of proof section of asylum regulation has impacted closeted LGBTQ+ asylum applicants.<sup>41</sup> For example, an IJ denied asylum to Mr. Shahinaj, a gay man from Albania, because he was unable to present evidence of his involvement with LGBTQ+ organizations in Albania.<sup>42</sup> Similarly, Mr. Barragan-Ojeda, a gay man from Mexico, received an adverse credibility determination and an IJ subsequently denied asylum to him because of his failure to initially disclose his sexuality to immigration officials.<sup>43</sup> IJs and the BIA's

---

37. See Conroy, *supra* note 9, at 25-27 (explaining how the REAL ID Act creates more opportunities for IJs to rely on inconsistencies within an applicant's statement to make an adverse credibility determination, despite inconsistencies that are inherent to an asylum applicant's chronology of persecution).

38. See *id.* at 25 (concluding that preference for corroboration commonly results in the denial of asylum claims by applicants who are unable to present corroboration).

39. See *id.* (explaining that the REAL ID Act was a departure from *In re S-M-J-* and *Matter of Dass* because it requires applicants, at a minimum, to present credible, persuasive testimony and all corroborating evidence the IJ subjectively deems reasonably available or obtainable).

40. See UNHRC Handbook, *supra* note 33 at 237-38 (emphasizing the importance of considering all subjective elements of an applicant's claim, including personal and family background, membership in groups, one's own interpretation of the situation, and personal experiences).

41. See *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (reversing IJ decision denying a closeted gay man from Albania asylum following a finding of adverse credibility because Mr. Shahinaj lacked gay mannerisms and evidence of involvement in the Albanian gay community).

42. See *id.* (noting that the IJ erred when he found it necessary for Mr. Shahinaj to present more than affidavits and country conditions documents to show his status as a gay man).

43. See *Barragan-Ojeda v. Sessions*, 853 F.3d 374, 383 (7th Cir. 2017) (attributing

interpretation of the REAL ID Act requiring a higher evidentiary standard for corroboration resulted in the denial of many closeted LGBTQ+ applicants on the basis of adverse credibility and a lack of corroboration.<sup>44</sup>

For closeted LGBTQ+ individuals, corroborating evidence of involvement with the LGBTQ+ community in their country of origin is often non-existent, as many avoided association with the community to avoid further persecution.<sup>45</sup> If an applicant cannot produce corroboration, his or her personal testimony must be sufficient on its own, credible, persuasive, and specific.<sup>46</sup> However, inconsistencies are prevalent among the asylum claims of closeted LGBTQ+ applicants.<sup>47</sup> This is because many LGBTQ+ applicants are hesitant to reveal their sexual orientation before, during, and after arrival to the U.S.<sup>48</sup> Withholding one's sexual orientation for the majority of one's immigration proceeding is a reasonable extension of behavior for many queer applicants when arriving from their countries of origin, because concealment may be deemed as necessary for their survival.<sup>49</sup> Nevertheless, after the REAL ID Act's enactment, closeted LGBTQ+ applicants' concealment of sexual orientation has often led to adverse credibility determinations and denials of asylum claims.<sup>50</sup>

---

Mr. Barragan-Ojeda's initial inconsistent statements regarding his sexuality to the adverse credibility determination).

44. See Conroy, *supra* note 9, at 28 (stating that over the course of eight years, the Ninth Circuit Court of Appeals denied over half of sexual minority applicants' asylum claims on account of an adverse credibility determination that was based on a lack of corroboration).

45. See Razkane v. Holder, 562 F.3d 1283, 1287 (10th Cir. 2009) (finding it reasonable that a gay man from Morocco would not have evidence to show his sexual identity because the country routinely persecuted queer people).

46. See 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (indicating that testimony that meets such criteria is only sufficient if it subjectively satisfies the trier of fact).

47. See Conroy, *supra* note 9, at 37-39 (discussing how the inherent nature of LGBTQ+ asylum claims results in inconsistencies).

48. See Barragan-Ojeda v. Sessions, 853 F.3d 374, 383 (7th Cir. 2017) (affirming denial of asylum for a gay Honduran man because his failure to reveal his sexual orientation during his initial hearing made him not credible).

49. See United Nations High Commissioner for Refugees, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, available at <https://www.refworld.org/docid/48abd5660.html> (last visited Jul. 19, 2019) (concluding that applicants who were forced to conceal their sexual orientation to avoid persecution later struggle to demonstrate past persecution).

50. See Conroy, *supra* note 9, at 34 (explaining how the REAL ID Act's allowance of IJ's to consider demeanor, candor, and responsiveness has negatively impacted the credibility of LGBTQ+ applicants who do not want to discuss their sexual orientation openly in court).

## II. ANALYSIS

*A. IJs Have Misinterpreted the REAL ID Act as Requiring Corroboration and Satisfaction of Subjective Elements of Credibility Despite Binding Case Law Requiring the Totality of the Circumstances Standard and Exceptions to Corroboration.*

*1. The REAL ID Act's Addition of the "Sustaining the Burden" Section Has Been Misinterpreted as Always Requiring Asylum Applicants to Corroborate Their Claims even Though There Are Exceptions to Corroboration.*

Following the passage of the REAL ID Act in 2005, IJs have required corroborating evidence from all asylum applicants, even if such evidence is not inherent to the nature of the applicant's claim.<sup>51</sup> However, the REAL ID Act's focus on corroboration did not replace binding case law or the provision in the REAL ID Act allowing for credible, persuasive, and specific personal testimony as sufficient for an asylum claim in the absence of other corroborating evidence.<sup>52</sup> The REAL ID Act did not overrule *Matter of Dass*, *Matter of Mogharrabi*, or *Matter of S-M-J-*. In fact, the asylum regulation incorporates the holdings of those three cases to allow for personal testimony to be sufficient if it is not overly broad, is sufficiently detailed, and is supported by available country condition information.<sup>53</sup> Despite regulations and legal precedent permitting personal testimony without corroboration that meets a certain standard, IJs have zeroed in on the portion of the "sustaining the burden" section that requires the trier of fact's satisfaction with the applicant's personal testimony for it to be sufficient without corroboration.<sup>54</sup> IJs have used this portion of the REAL ID Act to

---

51. *See* *Ali v. Mukasey*, 529 F.3d 478, 487 (2nd Cir. 2008) (remanding the IJ's denial of a gay Guyanese man's asylum claim, which was based on adverse credibility: finding the man did not present evidence of looking queer in Guyana).

52. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) (stating that an applicant's testimony may be sufficient to sustain the burden of proof if it is credible, persuasive, and refers to specific facts reflecting asylum eligibility).

53. *See* *In re S-M-J-*, 21 I&N Dec. 722, 736 (BIA 1997) (holding that information about a country's general conditions is applicable and should be entered into the record to support personal testimony); *see also* *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (holding that personal testimony must sometimes be sufficient on its own because it is unreasonable to expect corroboration from every asylum applicant); *Matter of Dass*, 20 I&N Dec. 120, 125 (BIA 1989) (finding overly broad testimony to be unacceptable, but determining that specific fact-based testimony can be sufficient).

54. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) (modifying previous regulation to allow for the trier of fact to determine what is sufficient in terms of personal testimony,

apply a subjective standard in deciding whether personal testimony suffices without corroboration.<sup>55</sup> This standard frequently disregards objective standards of consistency, persuasiveness, and credibility outlined in the same section.<sup>56</sup>

In practice, this misinterpretation has manifested itself by requiring applicants to present corroborating evidence even when such evidence is unavailable and supplemental country conditions information is provided.<sup>57</sup> Most post-REAL ID Act asylum decisions reference verbatim the exact language of the “sustaining the burden” section as an explanation for the requirement of corroborating evidence, even when country conditions reports show that such evidence may be unavailable or difficult to obtain.<sup>58</sup> IJ’s reading of the subjective element of the “sustaining the burden” section to mean that personal testimony alone never suffices has negatively altered decisions and strategies to litigate asylum cases.<sup>59</sup> This reality pressures asylum applicants to go to great lengths in obtaining corroborating evidence that satisfies an IJs’ post-REAL ID Act preference for corroboration.<sup>60</sup> In contrast to the law prior to the REAL ID Act, when many asylum applicants relied heavily on their personal testimony as the strongest evidence of the persecution they suffered, applicants must now prepare and present their cases with the REAL ID Act in mind.<sup>61</sup> They supplement their testimony with ample country conditions information and provide all possible corroborating evidence, no matter how onerous it is to obtain such evidence, in the hopes that the IJ will find their record complete and sufficient.<sup>62</sup> Such

---

allowing the threshold for sufficiency to vary between IJs).

55. *See id.* (phrasing the “sustaining the burden” section as though corroboration can be a requirement if the trier of fact so desires).

56. *See id.* (permitting triers of fact to weigh personal testimony and require corroboration if they deem it necessary).

57. *See Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009) (reversing the IJ’s denial of the applicant’s asylum claim, which was based on a lack of corroboration of homosexuality despite the applicant’s proof of his country’s pattern of LGBTQ+ persecution in Morocco).

58. *See Eke v. Mukasey*, 512 F.3d 372, 381 (7th Cir. 2008) (citing the REAL ID Act as imposing an evidentiary standard that the applicant could not meet because he did not present any corroboration of his sexuality).

59. *See Conroy*, *supra* note 9, at 25-26 (explaining how IJs’ focus on corroboration has led to applicants bolstering their claims with any and all evidence they can obtain).

60. *See id.* at 25 (adding that applicants sometimes put themselves in greater risk of future persecution when attempting to obtain corroborating evidence).

61. *See id.* at 26 (highlighting how attorneys for asylum applicants strategize on the evidence to include in applications).

62. *See id.* at 30 (describing the hardships applicants endure to provide corroboration

applicants are taking these great lengths, which could be better spent strengthening their personal testimony, to provide corroboration despite legal precedent allowing for consistent, credible, and specific personal testimony alone as sufficient.<sup>63</sup>

2. *The REAL ID Act's Addition of the "Credibility Determination" Section Has Been Misinterpreted as Requiring Asylum Applicants to Satisfy All Subjective Factors of Credibility even Though the Totality of the Circumstances is the Correct Standard.*

IJs have also misinterpreted the REAL ID Act's modifications to asylum regulation by requiring asylum applicants to meet all of the subjective factors listed in the "credibility determination" section—instead of making a valid asylum claim based on the "totality of the circumstances."<sup>64</sup> The REAL ID Act's addition of the "credibility determination" section did little more than more clearly define what an IJ should consider when assessing the totality of the circumstances.<sup>65</sup> However, IJs have misinterpreted the additional section to be a laundry list of factors that each applicant must meet for credibility.<sup>66</sup>

Since the REAL ID Act, IJs have incorrectly relied on the various factors listed in the "credibility determination" section to deny an applicant asylum based on a failure in meeting any single enumerated factor—despite the section explicitly stating that credibility depends on the "totality of the circumstances."<sup>67</sup> Even if the applicant has plausible and consistent testimony, is responsive, and has a trustworthy demeanor and believable candor, any inaccuracy in the applicant's testimony can result in an adverse credibility determination and a denial of asylum.<sup>68</sup> Such a departure from

---

such as taking the risk of reaching out to authorities in their home countries for evidence of their pattern and practice of persecuting LGBTQ+ individuals).

63. See 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) (stating that personal testimony may be sufficient if corroborating evidence cannot be reasonably obtained).

64. See *Moab v. Gonzales*, 500 F.3d 656, 661 (7th Cir. 2007) (reversing the IJ's denial, which was primarily based on an adverse credibility determination because of inconsistencies related to when the applicant disclosed his sexuality).

65. See 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (defining the totality of the circumstances as including demeanor, candor, responsiveness, plausibility of testimony, consistency, any inaccuracies, and any other factor).

66. See Conroy, *supra* note 9, at 12 (emphasizing how the enumeration of the factors that comprise the "totality of the circumstances" has led to IJs treating each factor as a requirement).

67. See *Moab*, 500 F.3d at 661-62 (remanding denial because refusing to initially disclose his homosexuality upon arrival to the U.S., alone, should not have resulted in an adverse credibility determination).

68. See *id.* at 661 (finding the applicant met all factors for being credible except for

the pre-REAL ID Act practice of looking at the content of an applicant's case as a whole to determine the personal testimony's credibility is an inaccurate reading of the REAL ID Act by IJs.<sup>69</sup>

IJs have misinterpreted the section's explanation of what factors to consider as part of the "totality of the circumstances" to impose a burden on applicants through rigid and subjective requirements.<sup>70</sup> For example, IJs have made adverse credibility determinations resulting in the denial of asylum when an applicant's demeanor in court is not to the IJ's liking.<sup>71</sup> Although the applicant's claim may otherwise be plausible, consistent, believable, and contain no inaccuracies, IJs have used the "credibility determination" section to make adverse credibility determinations based on demeanor alone.<sup>72</sup> IJs do not make such determinations in consideration of the "totality of the circumstances," but rather consider only one factor to comprise the totality of the circumstances—contrary to the REAL ID Act.<sup>73</sup>

IJs use the inclusion of demeanor, candor, and responsiveness in the "credibility determination" section, added by the REAL ID Act, to assess asylum claims based on their own personal opinions.<sup>74</sup> This is in stark contrast to pre-REAL ID Act asylum law, where IJs only used objective factors to assess an applicant's credibility.<sup>75</sup> Instead of focusing on applicants' satisfaction of objective factors of credibility, IJs have instead

---

one, which resulted in failure to meet the totality of the circumstances test).

69. See *In re S-M-J-*, 21 I&N Dec. 722, 728-29 (BIA 1997) (advising IJs that adverse credibility determinations are appropriate when there are inconsistent statements and improbable testimony that contradicts country conditions evidence).

70. See *Conroy*, *supra* note 9, at 27 (explaining how the REAL ID Act increased the significance IJs can place on subjective factors in an applicant's asylum claim, particularly in relation to an applicant's personal testimony).

71. See *id.* (describing demeanor as an inappropriate basis for a credibility determination because demeanor is interpreted differently by adjudicators based on culture, language, and personality).

72. See *Barragan-Ojeda v. Sessions*, 853 F.3d 374, 379 (7th Cir. 2017) (denying asylum to a Honduran man because the IJ found his demeanor to not be credible because he was not forthcoming about his homosexuality).

73. See *id.* (citing demeanor as the main reason for the adverse credibility determination despite the plausibility of the applicant's claim); see also 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (listing factors that triers of fact should weigh when assessing an asylum claim).

74. See *Conroy*, *supra* note 9, at 27 (describing the addition of these subjective factors as inappropriate because they invite IJs to insert their bias into what is meant to be a statutorily objective analysis).

75. See *In re S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997) (listing only inconsistency and improbability as the factors an IJ can analyze when making a credibility determination).



placed more weight on the subjective factors of credibility to make adverse credibility determinations based on demeanor, candor, or responsiveness alone.<sup>76</sup> For example, in *Moab*, the initial IJ relied on Mr. Moab's reticence in providing explicit details of his sexuality to make an adverse credibility determination based on Mr. Moab's demeanor.<sup>77</sup>

IJs also misinterpret the "credibility determination" section to asylum regulation by destroying any possibility of giving asylum applicants the benefit of the doubt.<sup>78</sup> Since the last sentence of the "credibility determination" section states that there is no presumption of credibility for asylum applicants, IJs require asylum applicants to overcome an invisible hurdle of credibility to have their asylum claims assessed for their merits.<sup>79</sup>

Although the REAL ID Act did not change the eligibility requirements for an asylum claim, IJs now misinterpret the credibility requirement as a prerequisite for hearing an asylum claim.<sup>80</sup> Pre-REAL ID Act credibility precedent such as *Mogharrabi* and *Dass* emphasize the importance of adjudicators considering plausibility and consistency when assessing an applicant's testimony for credibility. Both cases focus on looking at the applicant's case as a whole to see if anything glaringly indicates adverse credibility.<sup>81</sup> In *Mogharrabi*, the Board held that IJs should determine credibility by examining whether there was a "clear probability" that the applicant's testimony was true.<sup>82</sup> Similarly, in *Dass*, the Board narrowed in

---

76. See *Barragan-Ojeda v. Sessions*, 853 F.3d 374, 383 (7th Cir. 2017) (emphasizing the importance of demeanor over other factors for credibility determinations).

77. See *Moab v. Gonzales*, 500 F.3d 656, 661-62 (7th Cir. 2007) (reversing and remanding the IJ decision in part because the IJ had erred in placing too much weight on the applicant's demeanor when assessing his asylum claim and making an adverse credibility determination).

78. See 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (explicitly stating that there is no presumption of credibility for asylum applicants).

79. See *Conroy*, *supra* note 9, at 27 (emphasizing how the statement that "no presumption of credibility exists" has led IJs to treat credibility as a third prong for asylum eligibility).

80. See 8 U.S.C. § 1101(a)(42) (stating the requirements for asylum eligibility); see also *Conroy*, *supra* note 9, at 27 (criticizing the weight IJs give to credibility over an applicant's clear satisfaction of statutory requirements for asylum eligibility).

81. See *In re Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (noting that an applicant should be found credible if their testimony is detailed, plausible, and coherent); see also *In re Dass*, 20 I&N Dec. 120, 123-24 (BIA 1989) (emphasizing the importance of consistency throughout an applicant's whole claim in determining credibility).

82. See *Mogharrabi*, 19 I&N Dec. at 441 (clarifying that a reasonable person may have a well-founded fear of persecution even if the likelihood is less than clearly probable).



on the importance of specificity and warned against granting asylum to applicants who make “broad, sweeping claims.”<sup>83</sup> Despite this precedent, the REAL ID Act’s “credibility determination” section’s statement that there is no presumption of credibility led the IJs to incorrectly treat credibility as a near impossible requirement for asylum seekers to satisfy.<sup>84</sup>

IJs’ misinterpretation of both the corroboration and credibility sections significantly intersect when it comes to an applicant establishing asylum eligibility.<sup>85</sup> IJs interpret corroboration as an absolute necessity for establishing both a credible and a valid asylum claim; this is incorrect, given binding case law allowing detailed and specific personal testimony to suffice when coupled with supporting evidence of a country’s conditions.<sup>86</sup> IJs misinterpreted the REAL ID Act in the “sustaining the burden” section when asylum claims are denied on this front—despite the “totality of the circumstances” indicating credibility.<sup>87</sup>

*B. Misinterpretation of the REAL ID Act’s Modification to the Burden of Proof Section of Asylum Regulation Resulted in the Denial of Closeted LGBTQ+ Applicants’ Asylum Claims*

Due to the IJ’s misinterpretation of the REAL ID Act, closeted LGBTQ+ applicants repeatedly fail to meet the evidentiary standard for asylum and are often denied asylum as a result.<sup>88</sup> Since such applicants often qualify for asylum on account of their perceived or imputed membership in their particular social group — the LGBTQ+ community of their home country — the availability and obtainability of evidence of such membership, when

---

83. See *Dass*, 20 I&N Dec. at 120 (stating that generalized testimony is not enough to establish asylum, especially when no corroboration is provided).

84. See Conroy, *supra* note 9, at 11 (comparing pre-REAL ID use of credibility as a factor for asylum eligibility to post-REAL ID use of credibility as a requirement for asylum eligibility).

85. See *id.* at 25-28 (discussing the difficulty of establishing credibility without corroboration and vice versa).

86. See *id.* at 16 (illustrating the negative repercussions the REAL ID Act caused by adding the “corroboration” and “credibility” factors, and the consequences asylum applicants endure when corroboration is not possible, including the high rate of denial for applicants whose cases rely solely on personal testimony).

87. See *Moab v. Gonzalez*, 500 F.3d 656, 661 (7th Cir. 2007) (criticizing the IJ’s finding that the applicant’s lack of corroboration of his sexuality contributed to an adverse credibility determination).

88. See 8 U.S.C. § 1158(b)(1)(B)(i-iii) (2006) (creating the opportunity for IJs to apply a more subjective test for analyzing an asylum applicant’s eligibility based on supporting evidence).

the applicant is not out, is sparse.<sup>89</sup> Applicants are no longer able to establish perceived membership in a particular social group based on consistent, credible, and specific personal testimony in combination with reliable third party country conditions reports.<sup>90</sup> As a result, closeted LGBTQ+ applicants fail to meet the high evidentiary burden that IJs impose through their misinterpretation of the corroboration and credibility sections that the REAL ID Act added.<sup>91</sup> IJs also often make adverse credibility determinations on closeted LGBTQ+ asylum cases partly because of the lack of corroboration inherent to such cases and because of the cases' inherent inconsistencies and issues with applicant demeanor or responsiveness.<sup>92</sup>

*1. Misinterpretation Results in the Denial of Closeted LGBTQ+ Asylum Claims Based on Lack of Corroboration.*

Closeted LGBTQ+ applicants struggle to satisfy the strict and subjective corroboration requirements IJs incorrectly impose following the REAL ID Act's addition of the "sustaining the burden" section.<sup>93</sup> Even when country conditions reports clearly demarcate a pattern and practice of persecution of the LGBTQ+ community in the applicant's country of origin, IJs now require asylum-seekers to supply supporting documentation of their involvement in the LGBTQ+ community, even when avoidance of such involvement may have been necessary for the applicant's survival.<sup>94</sup> Since personal testimony, even if it is detailed, specific, and consistent with country conditions evidence, rarely suffices by IJs due to their misinterpretation of the REAL ID Act's "sustaining the burden" section, closeted LGBTQ+ applicants must

---

89. See *Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3rd Cir. 2003) (allowing an applicant to establish asylum eligibility based on perceived membership in a particular social group).

90. See *Conroy*, *supra* note 9, at 5 (comparing pre-REAL ID law that accepted personal testimony to the higher scrutiny IJs have placed on cases reliant on personal testimony post-REAL ID law).

91. See *Razkane v. Holder*, 562 F.3d 1283, 1287-89 (10th Cir. 2009) (overturning denial of asylum based on lack of corroboration despite ample country conditions evidence and credible personal testimony).

92. See *Conroy*, *supra* note 9, at 15 (describing the issues queer applicants face due to the social visibility elements judges view as necessary for an applicant to establish membership in a particular social group such as the LGBT community).

93. See *Eke v. Mukasey*, 512 F.3d 372, 381 (7th Cir. 2008) (denying asylum to a queer man because the IJ found that corroborating evidence should have been obtainable).

94. See *id.* at 375 (noting that Nigeria had a pattern and practice of persecuting queer people, but still requiring Mr. Eke to supply evidence of his sexuality, which he hid to avoid ostracization, torture, and murder in his village).

produce often intangible evidence of their perceived membership in the LGBTQ+ community.<sup>95</sup>

The denial of closeted applicant Prince Henry Eke's asylum claim is an example of the negative impact of IJs' misinterpretation of the "sustaining the burden" section the REAL ID Act added.<sup>96</sup> Although the Seventh Circuit affirmed the BIA and immigration court's finding of a pattern and practice of persecution against LGBTQ+ individuals in Nigeria, Mr. Eke's personal testimony as to his fear that someone in his village might "out" him does not suffice to establish asylum eligibility.<sup>97</sup> Mr. Eke's inability to provide corroboration of his sexuality led to the Court's inability to determine whether or not Mr. Eke was gay.<sup>98</sup> In this way, such a strict application of the "sustaining the burden" section the REAL ID Act added led to adjudicators unreasonably requiring evidence of Mr. Eke's sexual orientation.<sup>99</sup> Such evidence would have been nearly impossible for Mr. Eke to provide, considering he took all steps necessary to avoid persecution in his home country.<sup>100</sup> If the adjudicators adhered to binding precedent or correctly applied the "sustaining the burden" section regarding the sufficiency of detailed, consistent, and specific personal testimony, the adjudicators may have approved Mr. Eke's asylum claim.<sup>101</sup>

Similarly, the BIA misinterpreted the "sustaining the burden" section the

---

95. See Conroy, *supra* note 9, at 15 (emphasizing that evidence of social visibility of membership in a particular social group is inherently difficult to obtain as it relates to the subjective perception of persecutors).

96. See Eke v. Mukasey, 512 F.3d 372, 381 (7th Cir. 2008) (stating that the applicant's request for asylum was denied because he failed to show credibility, and did not provide evidence to corroborate his claim that he was gay and feared persecution in his small village in Nigeria).

97. See *id.* (describing how Mr. Eke was unable to provide any supporting witnesses or documentation confirming his sexual preferences).

98. See *id.* at 382 (stating that Mr. Eke failed to establish his membership in the particular social group of LGBTQ+ individuals in Nigeria because he did not have consistent documentation of his previous sexual relationships with men).

99. See *id.* at 377 (mentioning that Mr. Eke did not present evidence to demonstrate a clear probability of his well-founded fear of persecution).

100. See *id.* at 381-82 (explaining that had Mr. Eke presented corroboration of his sexuality, he would have been able to establish a well-founded fear of future persecution due to the pattern and practice of killing queer people in Nigeria).

101. See 8 U.S.C. § 1158(b)(1)(B)(i-iii) (2006) (stating that corroboration is preferred, but not absolutely required, if the applicant's personal testimony is credible, specific, detailed, and consistent, and corroboration is not feasible); see also *In re Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (holding that personal testimony is sufficient if it is detailed, specific, and consistent and corroboration is not possible based on the circumstances of the case).

REAL ID Act added and affirmed the immigration court's denial of asylum for Mr. Shahinaj because he failed to report to LGBTQ+ rights organizations or to the authorities evidence of persecution he suffered for being a closeted gay man in Albania.<sup>102</sup> Mr. Shahinaj fled to the United States because he is gay and lived in fear of the discovery of his sexuality in Albania, where authorities routinely beat queer people.<sup>103</sup> In reversing the BIA's affirmation of denial, the Eighth Circuit correctly applied the "sustaining the burden" section that the REAL ID Act added by finding that it was reasonable that Mr. Shahinaj would not possess such supporting documentation because he hid his sexual orientation to avoid further persecution in Albania.<sup>104</sup> Mr. Shahinaj's detailed, specific, and consistent personal testimony sufficed without corroboration, despite the misapplication of the REAL ID Act by the BIA and the IJ.<sup>105</sup>

As the cases of Mr. Shahinaj and Mr. Eke show, corroboration is often an insurmountable challenge for closeted LGBTQ+ asylum applicants, who hid their sexual orientation in their home countries to avoid severe persecution.<sup>106</sup> Some may consider corroboration contradictory to the root of such applicants' claims, which are based on the notion that fear of persecution was so well-founded that withholding one's sexual orientation was essential to avoiding death.<sup>107</sup> Even when such applicants present ample, objective country conditions evidence demonstrating severe persecution in their countries of origin, corroboration remains necessary.<sup>108</sup>

---

102. *See* *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (finding that the BIA and IJ denial was erroneous because it was reasonable for the applicant to not have access to such corroboration because he was closeted and feared persecution if he outed himself to authorities).

103. *See id.* at 1028 (noting that the IJ had disregarded witness affidavits and country conditions evidence presented by Mr. Shahinaj).

104. *See id.* (noting the challenges corroboration presents for applicants such as Mr. Shahinaj, who feared reporting persecution on account of widespread violence against LGBTQ+ applicants in Albania by Albanian police).

105. *See id.* (explaining how personal testimony is sufficient in certain cases such as Mr. Shahinaj's because corroboration is not always possible).

106. *See id.* at 1028 (describing the efforts Mr. Shahinaj made to keep his sexuality hidden and avoid persecution); *see also* *Eke v. Mukasey*, 512 F.3d 372, 376 (7th Cir. 2008) (demonstrating that queer people are regularly persecuted and killed in Nigeria).

107. *See* *Conroy*, *supra* note 9, at 15 (explaining how social visibility evidence for LGBTQ+ applicants are difficult to obtain, especially in countries where being open about one's homosexuality increases the risk of severe persecution or even death).

108. *See id.* at 19-20 (explaining the practice of LGBTQ+ applicants relying on country conditions evidence to bolster their claims in the face of IJs requiring corroboration).

Had such applicants not been closeted, they may have had more documentation of their persecution, but they may also have exposed themselves to persecutors, especially in countries where there is a pattern and practice of violence towards LGBTQ+ individuals.<sup>109</sup> By deeming corroboration an absolute necessity for applicants such as Mr. Eke and Mr. Shahinaj, IJs incorrectly applied the REAL ID Act's addition of "sustaining the burden" section.<sup>110</sup> Such a misapplication resulted in a negative assessment of the applicants' asylum claims, which should have been approvable without corroboration because their personal testimony was consistent, detailed and specific.<sup>111</sup>

2. *Misinterpretation Results in the Denial of Closeted LGBTQ+ Asylum Claims Based on Adverse Credibility Determinations.*

Due to IJs' misinterpretation of the "credibility determination" section added by the REAL ID Act, IJs routinely deem closeted LGBTQ+ applicants not credible due to their inability to satisfy each of the various factors enumerated.<sup>112</sup> A closeted LGBTQ+ applicant's failure to satisfy just one of the enumerated factors often results in an adverse credibility determination and a denial of asylum.<sup>113</sup> Additionally, the reliance of IJs on the section explicitly denying a presumption of credibility prevents closeted LGBTQ+ applicants from receiving the benefit of the doubt and subjects the applicant to meet subjective standards of credibility that vary between judges.<sup>114</sup>

---

109. *See id.* at 29-30 (noting the risks that many LGBTQ+ applicants faced in their home countries for being openly involved in the LGBTQ+ community).

110. *See id.* at 25-26 (noting that IJs have interpreted the REAL ID Act as allowing them to investigate the plausibility of an applicant's ability to obtain corroboration).

111. *See In re Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (describing sufficient personal testimony as detailed, specific, and consistent, and noting that corroboration is not possible based on the circumstances of the case); *see also In re S-M-J-*, 21 I&N Dec. 722, 725 (BIA 1997) (holding that information about general country conditions can sufficiently supplement an applicant's personal testimony where it is unreasonable to demand corroborating evidence from the applicant).

112. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (stating that a credibility determination requires the IJ to weigh the different factors that comprise the totality of the circumstances).

113. *See Moab v. Gonzalez*, 500 F.3d 656, 661 (7th Cir. 2007) (reversing BIA's affirmation of IJ's denial of asylum for gay man from Liberia who was found not credible because his claim sounded "increasingly egregious"); *see also Barragan-Ojeda v. Sessions*, 853 F.3d 374, 382 (7th Cir. 2017) (denying asylum claim based on imputed membership in LGBTQ+ community because the applicant was not credible due to inconsistencies in applications).

114. *See Conroy*, *supra* note 9, at 34-35 (emphasizing the negative impact that not having a presumption of credibility has had on LGBTQ+ applicants).

For example, an IJ and BIA initially denied asylum to Dominik Moab in 2007 because he received an adverse credibility determination based on his failure to reveal and discuss his sexuality upon arrival to the U.S.<sup>115</sup> Even though Mr. Moab satisfied all other factors for a positive credibility determination, the IJ referred to his claim as “increasingly egregious,” misapplied the “credibility determination” section added by the REAL ID Act, and relied solely on Mr. Moab’s demeanor instead of the totality of the circumstances when making the adverse credibility determination.<sup>116</sup> In this way, the IJ’s misinterpretation of the “credibility determination” section negatively impacted Mr. Moab’s asylum case.<sup>117</sup>

Similarly, in 2017, an IJ denied asylum to Mr. Barragan-Ojeda for not establishing a credible claim of persecution on account of membership in the LGBTQ+ community in Mexico.<sup>118</sup> Even though Mr. Barragan-Ojeda explained that he did not initially disclose his homosexuality because he was young, scared, and representing himself *pro se*, the IJ found such an inconsistency fatal to his asylum claim because it removed credibility.<sup>119</sup> Pursuant to the “credibility determination” section, the IJ gave Mr. Barragan-Ojeda no presumption of credibility.<sup>120</sup> However, contrary to the “totality of the circumstances” standard, the IJ used just the one factor of inconsistency to make an adverse credibility determination.<sup>121</sup>

By erroneously requiring closeted LGBTQ+ applicants such as Mr. Moab and Mr. Barragan-Ojeda to satisfy every subjective factor of credibility

---

115. *See Moab*, 500 F.3d at 660 (criticizing the BIA and IJ’s adverse credibility determination for being subjectively based only on one factor of Mr. Moab’s case, namely his refusal to reveal his sexual orientation during his first questioning upon arrival in the U.S.).

116. *See id.* at 660-61 (emphasizing that initial airport interviews should not be the determining factor for whether credibility exists because of the intimidating nature of such interviews and the short time it takes to conduct such interviews).

117. *See id.* at 659 (noting the strict credibility requirements placed on asylum applicants by the REAL ID Act, but still finding that Mr. Moab was credible and established asylum eligibility).

118. *See Barragan-Ojeda v. Sessions*, 853 F.3d 374, 383 (7th Cir. 2017) (finding Mr. Barragan-Ojeda was not credible because he did not disclose his homosexuality during his initial court hearing).

119. *See id.* at 379 (explaining how inconsistent statements diminish an applicant’s claim and credibility even though inconsistency is only one of many factors when considering the totality of the circumstances).

120. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (noting explicitly that no presumption of credibility will be given to any applicant).

121. *See Barragan-Ojeda*, 853 F.3d at 380 (narrowing in on the inconsistency of Mr. Barragan-Ojeda’s statements as overwhelmingly indicative of him lacking credibility).



instead of considering credibility in light of the “totality of the circumstances,” IJs have disparately impacted the closeted LGBTQ+ community.<sup>122</sup> Inconsistencies, especially those resulting from initial interviews at the airport or upon apprehension by Customs and Border Protection, are inherent to many closeted LGBTQ+ asylum applicants, who are required to make the significant decision to “out” themselves to U.S. immigration authorities.<sup>123</sup> For these applicants, their survival in their home country depended on withholding their sexual orientation.<sup>124</sup> At the time of their initial arrival in the U.S., such applicants often fear immediate return to their home country, where they believe they will face increased persecution or death if they admit their sexuality—even if the applicant “comes out” to a U.S. immigration officer.<sup>125</sup> As a result, the applicants do not reveal their homosexuality until subsequent credible fear interviews or preliminary immigration court hearings, when they are more confident with their safety in the U.S. and are able to present their full stories.<sup>126</sup> Due to IJs’ focus on applicants satisfying every factor listed in the “credibility determination” section, such a slight inconsistency can detrimentally, and sometimes even fatally, affect the applicant’s asylum claim.<sup>127</sup>

The focus of IJs on the inclusion of demeanor, candor, and responsiveness as factors of the “totality of the circumstances” in the “credibility determination” section allows IJs to insert bias into their credibility determinations for closeted LGBTQ+ asylum applicants, despite precedent requiring IJs only account for objective factors of credibility.<sup>128</sup> This is

---

122. See *Moab v. Gonzalez*, 500 F.3d 656, 660-61 (7th Cir. 2007) (reversing denial of asylum based on inconsistencies of statements during an applicant’s first interview by CBP, demonstrating how misinterpretation of the REAL ID Act has affected the claims of closeted LGBTQ+ asylum applicants more than other applicants); see also *Barragan-Ojeda*, 853 F.3d at 383 (denying asylum because the applicant did not initially reveal his homosexuality during the asylum process).

123. See Conroy, *supra* note 9, at 37-39 (describing how the intimidation factor of initial credible fear interviews often results in inconsistent statements from LGBTQ+ applicants due to fear of persecution).

124. See *Moab*, 500 F.3d at 661 (attributing Mr. Moab’s initial failure to disclose his sexuality to the great lengths he took to hide his sexuality in his home country for many years).

125. See *id.* at 660 (emphasizing the risk applicants like Mr. Moab must consider in deciding to reveal their sexuality during their initial interviews at the airport).

126. See *id.* at 661 (confirming how common it is for applicants such as Mr. Moab to wait to reveal their sexuality).

127. See *In re S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997) (listing only inconsistency and improbability as the factors an IJ can analyze when making a credibility determination).

128. See Conroy, *supra* note 9, at 27 (describing the addition of these subjective



clearly seen in the cases of Mr. Moab, Mr. Shahinaj, and Mr. Razkane, where their lack of adherence to LGBTQ+ stereotypes regarding the way they talked, dressed, and looked was held against them by the IJs in their asylum hearings.<sup>129</sup> As a result of their misinterpretation of the REAL ID Act, IJs viewed adherence to such stereotypes as a necessity for these applicants to establish credible claims of persecution on account of membership in the particular social group of the LGBTQ+ community in their home countries.<sup>130</sup> This is despite the fact that imputed or perceived membership in a particular social group is acceptable for establishing a credible asylum claim.<sup>131</sup> Given the acceptability of imputed or perceived membership, the IJs in Mr. Shahinaj, Mr. Moab, and Mr. Razkane's cases erred in requiring them to demonstrate conformity with LGBTQ+ stereotypes.<sup>132</sup> Similarly, the IJs erred in assessing the three applicants' demeanor, candor, and responsiveness for satisfaction of LGBTQ+ stereotypes when making adverse credibility determinations on their asylum claims.<sup>133</sup>

As shown above, through misinterpreting the "credibility determination" section of the REAL ID Act, IJs created subjective standards for credibility that adversely affect closeted LGBTQ+ applicants.<sup>134</sup> Such applicants often qualify for asylum on account of their perceived or imputed membership in the particular social group of the LGBTQ+ community in their home

---

factors as inviting bias from IJs).

129. *See* *Moab v. Gonzalez*, 500 F.3d 656, 661 (7th Cir. 2007) (referencing how a lack of adherence to stereotypes of a particular social group does not indicate that an applicant does not belong to the group); *see also* *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009) (finding that the IJ's reliance on gay stereotypes to assess Mr. Razkane's asylum eligibility was erroneous); *Shahinaj v. Gonzalez*, 481 F.3d 1027, 1029 (8th Cir. 2007) (stating that mannerisms and speech should not be used to assess whether an applicant is gay).

130. *See* *Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3rd Cir. 2003) (finding that a gay man from Ghana could be considered belonging to the particular social group of LGBTQ+ individuals even though he was not gay through imputed membership).

131. *See id.* at 730 (explaining how imputed membership exists even if evidence of it is scarce).

132. *See id.* (noting that asylum applicants do not necessarily need to adhere to the stereotypes of a particular social group in order to have imputed membership).

133. *See* *Moab v. Gonzalez*, 500 F.3d 656, 661 (7th Cir. 2007) (stating that demeanor does not need to comply with stereotypes for a particular social group); *see also* *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009) (describing how the IJ erroneously assessed Mr. Razkane's demeanor in light of his own biased stereotypes about gay men); *Shahinaj v. Gonzalez*, 481 F.3d 1027, 1029 (8th Cir. 2007) (emphasizing that using stereotypes to assess credibility of an applicant is wrong).

134. *See* Conroy, *supra* note 9, at 34-35 (explaining the negative impact of these subjective factors on LGBTQ+ applicants).

country. Nevertheless, in requiring such applicants to meet every factor of the “totality of the circumstances,” IJs prevent closeted LGBTQ+ applicants from establishing credibility because of inconsistencies and issues with demeanor, candor, and responsiveness are inherent to such claims.<sup>135</sup>

### III. POLICY RECOMMENDATION

IJs should not require closeted LGBTQ+ applicants to present corroborating evidence to establish asylum eligibility if their personal testimony is detailed, specific, and consistent with country conditions evidence.<sup>136</sup> This is in compliance with both legal precedent and the “sustaining the burden” section added to asylum regulation by the REAL ID Act.<sup>137</sup> Additionally, it would reduce the severity of the evidentiary challenge such applicants face.<sup>138</sup> If IJs did not require such asylum-seekers to provide corroboration, they would no longer face the pressure of obtaining non-existent evidence of their actual or imputed membership in the LGBTQ+ community of their home country. They could instead focus their asylum case preparation — that is presenting persuasive personal testimony that is sufficiently detailed and specific.<sup>139</sup>

IJs should also possess objective guidelines on how to make REAL ID Act credibility determinations for closeted LGBTQ+ applicants.<sup>140</sup> Such guidelines could include reminders to consider the “totality of the circumstances,” baseline expectations for the demeanor, candor, and responsiveness of such applicants, and explanations on inconsistencies that are common for such applicants.<sup>141</sup> The guidelines would reinforce the

---

135. *See id.* at 36 (touching on how the candor, responsiveness, and demeanor factors are detrimental to LGBTQ+ applicants).

136. *See In re Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (confirming that an applicant’s own testimony can be enough without corroboration if it is believable, consistent, and sufficiently detailed).

137. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) (stating that credible testimony alone may sometimes be enough).

138. *See* Conroy, *supra* note 9, at 29 (noting that personal testimony is often the only way LGBTQ+ applicants can establish an asylum claim).

139. *See id.* at 15 (describing the challenges LGBTQ+ applicants face in obtaining evidence of their social visibility as a member of the LGBTQ+ community because of the nonexistent or discrete nature of such evidence that is a by-product of the pattern and practice of persecution against the LGBTQ+ community).

140. *See id.* at 34-36 (describing the negative impact subjective factors of credibility have on LGBTQ+ applicants and suggesting that such factors should be assessed in a more objective and comprehensive manner by IJs).

141. *See id.* at 37-39 (describing the different issues that are inherent to LGBTQ+ asylum claims such as inconsistencies with initial credible fear interviews, lack of

“totality of circumstances” focus that the “credibility determination” section the REAL ID Act seeks to emphasize, and it would also account for the discrepancies and nuances inherent to the asylum claims of closeted LGBTQ+ applicants.<sup>142</sup> While closeted LGBTQ+ applicants will not have a presumption of credibility, more guidance or training to IJs on how to assess and analyze the individual claims of closeted LGBTQ+ asylum applicants could go far in preventing bias and the misapplication of asylum law.<sup>143</sup>

#### CONCLUSION

IJs continue to misinterpret the REAL ID Act’s addition of the “sustaining the burden” and “credibility determination” sections to asylum regulation as requiring an applicant to meet a higher than necessary evidentiary burden when presenting an asylum claim.<sup>144</sup> Such misinterpretation has created an unreasonable burden of proof that requires otherwise credible closeted LGBTQ+ applicants to present corroboration for credibility and to support their claims of persecution.<sup>145</sup> The system should not require closeted LGBTQ+ asylum applicants to present corroborating evidence if they are credible and such evidence is unattainable, as personal testimony that is consistent, detailed, and specific suffices for establishing asylum eligibility under current regulations.<sup>146</sup>

---

responsiveness, and failure to fit LGBTQ+ stereotypes).

142. See 8 U.S.C. § 1158(b)(1)(B)(iii) (2006) (stating that a credibility determination depends on the totality of the circumstances and defining the totality of the circumstances as including demeanor, candor, or responsiveness, plausibility of testimony, consistency, any inaccuracies, and any other factor).

143. See Conroy, *supra* note 9, at 40-42 (criticizing the inherent bias permitted through the subjective credibility factors added by the REAL ID Act and recommending that IJs still use an objective means to view the claims of LGBTQ+ asylum applicants).

144. See 8 U.S.C. § 1158(b)(1)(B)(i-iii) (2006) (amending 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii)(2002)) (indicating a preference for corroboration and listing the factors for triers of fact to account for when considering the totality of the circumstances).

145. See *Moab v. Gonzales*, 500 F.3d 656, 662 (7th Cir. 2007) (remanding IJ’s denial on account of an adverse credibility determination unfairly based on applicant not immediately revealing his sexuality upon entering the U.S.); see also *Eke v. Mukasey*, 512 F.3d 372, 382 (7th Cir. 2008) (holding that corroboration for sexuality is required even if there is a pattern and practice of persecution in the applicant’s country of origin).

146. See *In re Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (holding that personal testimony is still sufficient on its own because it is unreasonable to expect corroborating evidence from every asylum applicant).